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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 613

O. L. SHANNON, *Petitioner*

vs.

UNITED STATES OF AMERICA

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. T. MILLER
JAMES O. CADE
Counsel for Petitioner

KENNETH BOWLIN
Of Counsel

Fort Worth Brief Printing Co., 126 South Main Street Phone FA-4070

INDEX

Subject	Page
Caption	1
Additional Specification of Error No. VI	1
Point IV	1
Summary Statement and Argument	2-6
Conclusion	7
Appendix "X"	8
Appendix "Y"	9

AUTHORITIES CITED

American Jurisprudence:

Vol. 20, page 1035, Sec. 484	6
Vol. 3, page 451, Sec. 891	6

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Petitioner O. L. Shannon asks leave of the Court to file and present the following as a supplemental to his "Brief in Support of Petition for Writ of Certiorari":

ADDITIONAL SPECIFICATION OF ERROR NO. VI:

The United States Court of Appeals erred in sustaining the trial court's action in overruling O. L. Shannon's Motion for Judgment of Acquittal, because the Government failed to prove any actual physical shortage of grain on any date mentioned in any count of the indictment. (R. p. 174-175 and 507-508)

POINT IV.

A conviction based solely on a false mathematical conclusion by an expert government witness constitutes a denial of "due process" under the Fifth Amendment to the Constitution.

SUMMARY STATEMENT AND ARGUMENT

During the period under survey in this case there had never been an actual physical inventory, at any time, of grains in storage at the O. L. Shannon warehouses. (R. pp. 94-95). The Government witness Charles C. Weaver, Jr., admitted (R. pp. 99-101) that, from the computations made, he couldn't tell "how much grain Mr. Shannon had on hand on any of these dates."

However, those very "computations" as made by the Government witness, John J. Bachmann, were the sole proof made by the Government to show shortages in grain on each of the dates mentioned in the indictment. (R. pp. 153-171.) The method used by Mr. Bachmann to reach the mathematical conclusions given by him in his testimony is described by him as follows. (R. p. 148).

> "Your Honor, *we took all of the records of grain coming in, into the house, and we took all of the records of the grain going out of the house.* WE put those in chronological order, day by day, and inserted them on a working sheet. We did the same thing insofar as the warehouse receipts were concerned and the stores, the open storage ledger, which is grain stored in the house not on warehouse receipts. We also put that in chronological order day by day. And after we had that day by day we made our calculations from a zero inventory—*at the time we were there there was no inventory, no grain on hand. With that we worked back day by day to show what inventory was to be or should be on hand according to the documents,* according to the records, and what the outstanding

obligations were for grain day by day, according to the records."

To illustrate the fallacy of such a mathematical manipulation, let us take an hypothetical case as illustrated by Appendix "X". In this hypothetical case we shall assume that a warehouseman started in business on May 1 with empty warehouses. He takes in 10,000 pounds of grain during the month and ships out 1,000 pounds. He loses 200 pounds by shrinkage (R. pp. 108-109, 122, 260) and has an actual physical inventory of 8,800 pounds at the end of the month. He continues in business and keeps perfect records on inventories, storage, shipments and outstanding warehouse receipts and finally goes out of business in October, leaving his warehouse empty. Appendix "X" above referred to, reflects his exact condition each month of his operations. A day by day record, if it were so broken down, would show his exact daily condition. This is true because the figures are taken from *exact records* based on *actual physical inventories.*

Now, the only figures Mr. Bachmann had available were those in Columns 3, 4, 8, and 9 of Appendix "X". From those figures worked "in reverse" and attempted to "reconstruct" the daily inventories, by "adding and subtracting" (R. p. 149.)

Following Mr. Bachmann's method, we have "reconstructed" the given hypothetical case, as shown in Appendix "Y". We do that by taking the last figure (7,875) in column 4 of Appendix "X" and placing it in Column 4 of Appendix "Y" as the first of the month inventory for October and in Column 5 of Appendix

"Y" as the end of September inventory. To this figure of 7,875 we add the 10,000 pounds of grain shipped out during September and then subtract the 2,000 pounds stored during that month (See R. p. 149.) This leaves an inventory of 15,875 pounds for September 1, *when, in fact, as shown by Col. 2 of Appendix "X", there was actually 16,267 pounds in storage on September 1.*

Of course, in the hypothetical case stated, we are using only a few thousand pounds of grain. It can readily be seen what a tremendous difference there would be where the amount dealt with, as in Shannon's case, ran into millions of pounds.

If we continue to follow Mr. Bachmann's mathematical process on through the hypothetical situation, a number of startling results occur. Not a single "reconstructed" inventory as shown in Appendix "Y" is anywhere near accurate as shown by Appendix "X". In each instance the "reconstructed" inventories of Appendix "Y" *show a much greater shortage than the actual inventories* reflected in Appendix "X". And, finally, under Appendix "Y" we come out in April, *the month before we started in business,* 2,125 pounds "short!"

Not only did we object (R. pp. 145-152) to this evidence as it came in, but we based our Motion for Judgment of Acquittal largely upon it. (R. pp. 174-175, 507-508). There is nowhere in the record any evidence, other than Bachmann's testimony, of shortage of grain during May, June and July, 1951. The periods covered in the indictment. The only inventory ever taken was in August 1951, which was subsequent to the dates

named in the indictment as well as being subsequent to the devastating flood of June 4, 1951 (R. pp. 273, 279) in which many millions of pounds were totally destroyed, (R. p. 286) above the usual and normal shrinkage.

There is no way in which there could have been a reliable or true "reconstruction" of Shannon's inventories from day to day, or from month to month, by the method followed in this case. We have found no accountant anywhere who can agree with Mr. Bachmann's figures or his method. He starts on a false premise and ends with a false answer. We believe that a prosecution founded upon such erroneously false mathematical conclusions deprives Mr. Shannon of that right to a fair trial guaranteed by the Constitution, and therefore denies to him his rights under the Fifth Amendment. It was never contemplated by the framers of our Constitution that a Government employee could, by juggling figures, and by giving purported expert mathematical testimony, based on such false figures, bring about the conviction of a citizen. We do not question Mr. Bachmann's ability as an accountant but we fail to comprehend the state of mind which prompted him to give such testimony as he did give, *when he must have known its fallacy from the accounting standpoint.* A man of his high intelligence must have known that his testimony as to shortages in grain on the particular dates, based on this false mathematical conclusion, was the testimony on which Shannon would be convicted, if at all.

The general law on such a situation is stated in

20 *American Jurisprudence* p. 1035, Sec. 1184, as follows:

> "Testimony of a witness, although not directly controverted, which is opposed to the unquestioned laws of nature that lie within the court's judicial knowledge or which is clearly in conflict with scientific principles as established by the laws of physics or mechanics is of no probative value. The court may refuse to permit such testimony to be received in evidence or considered by the by the jury; and, if it is admitted, the jury may disregard it, or the court may direct a verdict or sustain a demurrer to the evidence. The jury may not rest its verdict on testimony at variance with well-established and universally recognized physical, mechanical, and mathematical laws. A verdict that is based upon such testimony cannot be said to be based on any evidence and the trial court may set it aside and grant a new trial or upon review the appellate court may ignore the testimony or reverse the case for lack of evidence sufficient to sustain the same."

See also 3 *American Jurisprudence*, page 451, Section 891, holding to the same effect and citing numerous authorities in support.

CONCLUSION

It is, therefore, respectfully submitted, as in our main brief, that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

E. T. MILLER
JAMES O. CADE
By: _____
Counsel for Petitioner

KENNETH BOWLIN
Of Counsel

APPENDIX "X"

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6	Col. 7	Col. 8	Col. 9
	First of Month Physical Inventory in Pounds	Grain Stored in Pounds	Grain Shipped out in Pounds	2% Monthly Shrinkage in Pounds	End of Month Physical Inventory in Pounds	Accumulated Shrinkage 2% Monthly in Pounds	Outstanding warehouse receipts End of month in pounds	End of Month Book Inventory in Pounds
April	0	0	0	0	0	0	0	0
May	0	10,000	1,000	200	8,800	200	9,000	9,000
June	8,800	20,000	2,000	576	26,224	776	27,000	27,000
July	26,224	1,000	17,000	548	9,676	1,324	11,000	11,000
Aug.	9,676	10,000	3,000	409	16,267	1,733	18,000	18,000
Sept.	16,267	2,000	10,000	392	7,875	2,125	10,000	10,000
Oct.	7,875	0	7,875	0	0	2,125	2,125	2,125
Nov.	-2,125	0	0	0	0	2,125	2,125	2,125
TOTALS	-2,125	43,000	40,875			2,125	2,125	2,125

NOTE: In this hypothetical situation, all figures are taken from actual books and records of the warehouseman.

APPENDIX "Y"

Col. 1	Col. 2	Col. 3	Col. 4	Col. 5	Col. 6
	Grain Stored Pounds	Grain Shipped Out, Pounds	First of Month "Reconstructed" Inventory Pounds	End of Month "Reconstructed" Inventory Pounds	Outstanding warehouse receipts end of month in pounds
Nov.	0	0	0	0	2,125
Oct.		7,875	7,875	0	2,125
Sept.	2,000	10,000	15,875	7,875	10,000
Aug.	10,000	3,000	8,875	15,875	18,000
July	1,000	17,000	24,875	8,875	11,000
June	20,000	2,000	6,875	24,875	27,000
May	10,000	1,000	-2,125	6,875	9,000
April	0	0	-2,125	-2,125	2,125
March	0	0	0	-2,125	2,125

NOTE: This is the "reversed method" employed by Mr. Bachmann to "reconstruct" the inventories shown in Columns 4 and 5 above. **The only actual figures** he had were those in Columns 2, 3 and 6, above.